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No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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SACKMAN-GILLILAND CORPORATION, *Petitioner,*

v.

CHELSEA TITLE AND GUARANTY COMPANY, *Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

## QUESTION PRESENTED FOR REVIEW

Where a title insurance company has been sued for damages resulting from fraudulent misrepresentations made by its agent to an insured construction lender which induced said lender to advance $2,255,000.00 to a borrower, was there substantial evidence upon which reasonable and fairminded men, in the exercise of impartial judgment, could have reached difference conclusions so that it may be said that the trial court erred in granting a directed verdict for the defendant where the evidence was as follows:

(a) That Chelsea Title and Guaranty Co. provided a mortgage title insurance policy to Sackman-Gilliland Corporation in connection with a motel construction loan and, over the ensuing eight months, also provided eleven written endorsements to said policy purporting to show therein the "status of title" to the mortgaged premises as of each request for the advance of construction funds;

(b) That conventional underwriting standards require a title insurer, in reporting the "status of title" to a construction lender, to reveal all matters of record, and all nonrecord matters actually known to the insurer, which affect the title to the mortgaged premises;

(c) That Chelsea Title and Guaranty Co.'s agent, who was also the attorney for the borrower, issued the policy and eleven successive endorsements thereto and, in each instance, did not report to Sackman-Gilliland Corporation a transaction which occurred subsequent to the closing of the loan in which the borrower conveyed to a third party by unrecorded warranty deed that portion of the mortgaged premises upon which the motel was being constructed and, in addition, assigned to said third party a lease previously pledged to Sackman-Gilliland Corporation as collateral securing the loan;

(d) That the conveyance to the third party of the realty and the assignment of the lease did affect the "status of title" and was forbidden by the terms of the construction loan documents;

(e) That Sackman-Gilliland Corporation, relying on endorsements which revealed no such forbidden transfers of collateral, advanced to the borrower over an eight month period $2,255,000.00 which was the balance of a $2,800,000.00 construction loan;

(f) That knowledge of the forbidden transfers would have revealed to Sackman-Gilliland Corporation the financial instability of its borrower and the impairment of its collateral in time to prevent the advance of the $2,255,000.00 in loan proceeds;

(g) That Sackman-Gilliland Corporation would not have advanced said sum had it been made aware of the forbidden transfers and would, instead, have immediately declared a default and sought to recover the $500,000.00 it had advanced prior to the acts of misrepresentation;

(h) That the borrower abandoned the project and defaulted in payments on the loan necessitating a foreclosure action which took over a year to complete, during which time extensive deterioration which had beset the project prior to foreclosure continued, requiring the expenditure of an additional $1,400,000.00 by Sackman-Gilliland Corporation in an effort to salvage the project and, hence, its investment;

(i) That the foreclosure was completed in October, 1974, with Sackman-Gilliland Corporation acquiring title through the foreclosure sale at a time when the Florida real estate market was so depressed that Sackman-Gilliland Corporation was unable to find a buyer who

would agree to purchase the property for less than 100% financing and the infusion by Sackman-Gilliland Corporation of additional "salvage" capital on very favorable terms dictated by the buyer;

(j) That as a result of Chelsea Title and Guaranty Co.'s misrepresentation of the status of title, Sackman-Gilliland Corporation was damaged in that for over six years it lost the use of the $2,255,000.00 fund it was induced to invest and was required to infuse an additional $1,400,000.00 into the project in an effort to salvage and protect its investment so that the ultimate effect of the misrepresentation was to leave Sackman-Gilliland Corporation with a $348,398.00 net capital loss and damages resulting from the loss of use of its funds amounting to $1,400,866.00 in moratory interest computed at 6% per annum.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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Sackman-Gilliland Corporation, hereinafter referred to as "SG", petitions for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming, without opinion, the judgment of the United States District Court for the Middle District of Florida, entered pursuant to a directed verdict

in favor of Chelsea Title and Guaranty Co., hereinafter referred to as "CT".

## REFERENCE TO REPORTS

There are no published or unpublished written opinions other than those appearing in Appendix A and B hereto.

## JURISDICTIONAL GROUNDS

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 18, 1981. Petition for Rehearing before said Court was denied by an Order entered on April 22, 1981. The Supreme Court of the United States has jurisdiction to consider this Petition for Writ of Certiorari pursuant to 28 U.S.C. Sec. 1254(1).

## RULE OF CIVIL PROCEDURE INVOLVED

This case involves the propriety of the grant of a directed verdict pursuant to Rule 50(a), Federal Rules of Civil Procedure which provides:

> "(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury."

## STATEMENT OF THE CASE

### A. Course Of Proceedings And Disposition In The Courts Below:

On February 27, 1976, SG filed a Complaint against CT, in the United States District Court for the Southern District of New York. (R 1) The basis of federal jurisdiction was 28 U.S.C. Sec. 1332. SG alleged that CT through its agent, H. Knox Bettinghaus, had induced it to advance $2,255,000.00 to fund a construction loan to William A. Patterson and Vacation Concepts, Inc. through the device of endorsements to a title policy which contained fraudulent misrepresentations. SG sought compensatory and punitive damages for losses resulting from said fraudulent misrepresentations. CT's Motion to Dismiss or to Transfer to the Middle District of Florida (R 46) was granted as to transfer. (R 392).

Trial commenced on January 18, 1980, in Ocala, Florida. SG was required to proffer all evidence related to its damages. (Mangot proffer T[2]214 to 259 and Oral proffer by SG trial counsel William Gold (T[1]-723 to 767). The lower Court rejected the attorney's proffer on damages on February 7, 1980. (R 1447 to 1449) (T[2]-793 to 797). Subsequently, this ruling was reaffirmed and applied to the damage testimony proffered by Neil Mangot and Dr. Halbert Smith. (Court's ruling T[2]-287 to 288)

Accordingly, SG was not allowed to introduce any damage testimony. At the conclusion of SG's case-in-chief, the lower Court granted CT's Motion for Directed Verdict, holding as follows:

> "THE COURT: All right, the Defendant's motion for a directed verdict is granted because the evidence presented by SG is insufficient to establish a prima

facie case under the evidence and the applicable law. Now, when viewed in the light most favorable to the Plaintiff the evidence completely fails to support the claim for damages." (T[2]-308 to 309).

Judgment was entered in favor of CT on February 14, 1980. (R 1484) SG filed its Notice of Appeal on March 7, 1980. The Appeals Court affirmed the trial court by a per curiam opinion of March 18, 1981, and denied SG's Petition for Rehearing on April 22, 1981. (See Appendix A and B)

**B. The Evidence Presented**

SG is a New York mortgage banking corporation and a subsidiary of Banker's Trust New York Corporation. Its principle business is the making of loans secured by first mortgage liens to developers of real estate.

CT is a New Jersey corporation whose business is insuring owners and mortgagees with respect to the status of title of real estate and mortgage liens pertaining thereto.

**(a) The construction loan transaction out of which SG's claim arises.**

In April, 1972, SG committed to make a $2,800,000.00 construction loan for a motel project secured by a first mortgage on 87 acres in Lake County, Florida. (SG 2)[1] William A. Patterson and Vacation Concepts, Inc., his corporation, were the borrowers, hereinafter referred to as "Vacation Concepts". CT agreed to issue to SG a mortgage title insurance policy on the parcel. (SG 5-7, 10) Such insurance was arranged

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[1] "SG" number references in parentheses indicate Plaintiff's exhibit numbers at trial.

through CT's authorized agent, H. Knox Bettinghaus, Esq. (SG 8) Bettinghaus also agreed, as agent of CT, to issue the initial title binders, the title policy, and subsequent endorsements to said policy, required by SG as conditions to making the loan and advancing the proceeds in the form of periodic construction draws. (T[1]-194, 202, 246 to 247 and 256)[2]

On June 29 and 30, 1972, the loan was closed, all documents in connection therewith (SG 12-17)[3] having been executed. Bettinghaus was present at the closing also acting as attorney for the borrowers. (T[1]-209)

At closing, SG's closing attorney, Gassert, delivered to CT agent Bettinghaus a letter requiring as a condition precedent to final closing and recording of the mortgage documents, that CT agree to provide SG with:

> ". . . *written continuations* of the *status of the title when request is made by the borrower . . . for an advance* pursuant to the *building loan agreement* . . . such continuations . . . to be insured by the title company, Chelsea Title and Guaranty Co." (SG 18) Emphasis added.

SG desired these periodic title status reports to be appraised of any matters of record or known to CT which might adversely effect its mortgage security thus requiring a halt to further advances. (T[1]-222 to 226) CT agreed to provide such endorsement.

[2] "T[1]" references are to the transcript of trial testimony contained in five volumes commencing on January 28, 1980, and concluding on February 7, 1980. "T[2]" references are to the transcript of trial testimony contained in two volumes commencing on February 11, 1980, and concluding February 13, 1980.

[3] Mortgage Note for $2,800,000.00 (SG 13); Mortgage on the 87 acre tract securing said Note (SG 12); Assignment of Lessor's Interest as collateral security (SG 14); Assignment of Rents and Interest on Collateral Security (SG 15); Subordination of Lease (SG 16); and Building and Loan Agreement (SG 17).

**(b) The borrower's conveyance to a third party of SG's mortgage security.**

The SG-Vacation Concepts Building and Loan and mortgage documents forbade the conveyance of any part of or interest in the mortgaged premises (SG 17, paragraph 5(d), paragraph 9(e), and SG 12, paragraphs 10 and 19) (See Appendix C).

Between July 10 and 12, 1972, Vacation Concepts without the knowledge of SG — sold to one John Howe, Trustee, for $157,500.00 all of a strategically located 3.5 acre portion of the mortgaged premises, which plot was scheduled to be improved with a 124 room motel adjacent to the planned swimming pool and restaurant. (SG 53, 54, 56, 59, 60, and 63-67) Said price was some $50,000.00 less than the option to purchase clause contained in the lease assigned to SG. (SG-14)

The Howe sale documents were kept off the public records, being held by William Schumate, Esq., a purchaser himself, and attorney for the other purchasers. (SG 69-A) A document purporting to be an option to buy the same premises, likewise running in favor of Howe, dated July 12, 1971, (the same date as the fully executed warranty deed to Howe), exercisable between October 1 and 15, 1973, was recorded on the public records on July 17, 1972 (exactly one month before SG was called on for the first advance under the building loan). (SG 55)

On July 13, 1972, CT was informed of the Howe transaction by letter from its agent, Bettinghaus, enclosing copies of the CT Title Insurance Binder he had issued to Howe covering said 3.5 acres, dated July 10, 1972 (SG 61), a Binder Endorsement and CT's premium fee for the Howe title insurance. (SG 62) (T[1]-600 to 601)

All the documents for the Howe transaction were prepared by Bettinghaus. They included an assignment of the lease covering said premises (SG 57, 60), which lease had previously been assigned to SG with covenants against further assignment. (SG 14,15) (See Appendix C).

The true nature of the Howe transaction was confirmed when CT inquired of its agent Bettinghaus concerning the Howe transaction. (T[2]-604 to 60 ) CT received from Bettinghaus a reply letter dated July 10, 1973 (SG 72), which, among other things, acknowledged:

> "At the time of the execution of the option, a Warranty Deed was executed by William A. Patterson, individually and as Trustee, joined by his wife . . .
>
> "*The reason for the option rather than recording a Warranty Deed, was that the mortgagee (SG) would not allow any conveyance of the properties under the mortgage.*
>
> "*For all intents and purposes the option has really a* full closing with the exception of the recording of the deed . . .

**(c) The endorsement induced SG to advance funds.**

In mid-August, 1972, Vacation Concepts requested its first construction advance. SG in turn called on CT, in accordance with the provision of the June 30, 1972 closing letter, to furnish SG "with a written continuation of the status of the title" insured by CT. (SG 18)

On this occasion and on each subsequent draw request, CT, acting through agent Bettinghaus, forwarded to SG its Insurance Endorsement". . . in conjunction with the draw" involved, enclosed in a letter on Bettinghaus' law firm stationery. (See, e.g. SG-27) Between August 17, 1972 and March 15, 1973, as each additional

advance was called for, ten virtually identical letters were forwarded to SG, each enclosing a CT Endorsement, each showing no public recordings relating to the title or any information known to either CT or its agent relating to the title, and each extending the effective date of insurance coverage. (SG 27-33, 47-49)

The aforementioned Howe sale (SG 52-58 and 61-66) and the public recording of the Howe option (SG 55) was not reported to SG in any of the 11 successive endorsements despite the fact that the public record contained the Howe option and complete information as to the Howe transaction was personally known to CT's agent.

Relying on the fact that each of said Endorsements showed no matters relating to title or reflecting adversely on the financial stability of its borrower, SG continued to make advances through and including March 15, 1973, at which point, advances made pursuant to draw requests totaled $2,225,000.00.

SG's closing attorney, Gassert, testified that the "clean" status of title reflected by the Endorsements formed the basis of his decision to approve the continued advances of construction money. (T[1] 272, 274, 284, 296, 302, 306, 308, 340, 345, etc.) Together with the initial closing advance of $500,000.00, total advances at that date were $2,755,000.00. (T[1]-343).

**(d) The borrowers' defaults.**

In April, 1973, with construction incomplete, the borrowers defaulted in interest to the lender SG. (Mangot proffer, (T[1]-168 to 169) During that same month, approximately $350,000.00 in mechanics liens were filed against the premises, a replevin suit for the

sewer plant was filed, and Vacation Concepts effectively abandoned the project. (T[1]-370 to 371, 637 to 638, 670 to 671) and (Mangot proffer (T[2]-125)

**(e) SG's first full knowledge of the Howe transaction.**

Thereafter, at a July, 1973, meeting with the borrower, SG first learned that on July 12, 1972, a complete sales transaction covering the 3.5 acre plot had in fact been concluded with Howe for the sum of $157,500.00. (T[1]-672 to 675)

SG officials testified that had they been informed of the details of the Howe transactions in the initial CT endorsement of August 17, 1972, or any subsequent endorsement, they would have considered their security impaired, immediately ceased funding the loan, and declared a default. (T[1]-485, 546 to 550, 552 to 555 and 649 to 650) Expert witness, Dr. Halbert Smith, former Chief Economist for the Federal Home Loan Bank Board (T[2]-202) and a man of considerable expertise in institutional lending practices testified that knowledge of the Howe transaction revealed impaired security and would have required a prudent lender to halt further advances and take immediate action to obtain the return of all monies thus far advanced. (Smith proffer, (T[2]-239 to 242)

**(f) Evidence of CT's duty to give SG continuations of status of title which reveal all record matters and all non-record matters within CT's actual knowledge, relating to the mortgage security.**

Testimony of CT experts actually called by SG revealed that the term "continuation of the status of ti-

tle", as used in the June 30, 1972 letter from SG to CT (SG 18), means:

> "That the lender wants to know that the borrower still owns the land which was given as security for the construction loan and that the borrower owns the land in the same condition and status as an owner as the land was owned when the loan was originated and the construction mortgage was made a matter of public record and the monies advanced for the purpose of conducting the construction that was intended. And that nothing has happened to the land with regard to its ownership that would, in the opinion of the lender, adversely affect the construction loan mortgage." (T[2]-18)

Thus, "according to conventional underwriting standards of title insurance underwriters," the initial CT endorsement given on August 15, 1972 to SG "should have shown the [Howe] option." (T[2]-32). They further conceded it would have been "better practice" to also report the Howe warranty deed and lease assignments. (T[2]-20 and 22).

SG expert, James Covington, real estate attorney, president of a title company, and former general counsel to American Title Insurance Co. and Peninsula Title Insurance Co. (T[2]-34 to 38), testified that SG's request for "continuations of the status of title" imposed a duty on CT to report the Howe Option, Warranty Deed, Lease Assignment, and all known details of the Howe transaction for the reasons that:

> "It is a very material thing to a lender from the viewpoint of a title insurance company that the lender be kept fully informed as to any and all matters that are of public record or of which there is actual knowledge that might affect the lender's business decisions with regard to the loan which is

the subject of the mortgage described in the policy." (T[2]-59) and see (T[2]-60 to 69)

SG expert, Smith, testified that the request for periodic continuations of the status of title by a construction lender such as SG was "standard operating procedure" designed to insure they will be informed as to any sort of transaction of any type that affects title to the mortgaged property and, thus, SG's loan security. (Smith proffer, (T[2]-235 to 236)

**(g) The foreclosure**

In July, 1973, SG instituted foreclosure proceedings and was met with a myriad of cross-claims by mechanic lienors. Some 15 months later, a foreclosure judgment in the amount of $3,586,727.00 was obtained dismissing said cross-claims. The property was sold at foreclosure sale in September, 1974, to SG, there being no other bidders. SG's bid was $3,000,000.00, (T[2]-129 to 130), though the property was of much less value due to the deep real estate depression at that time. (Smith proffer (T[2]-247 to 258) However, Internal Revenue Service Rules created potentially severe tax consequences for mortgagees acquiring property with a bid significantly less than the amount loaned. So, SG, bid a sum approximately its total investment. (Mangot proffer, (T[2]-129 to 134).

**(h) SG efforts to salvage the investment and its damages**

SG was not a builder or developer. It sought a way to salvage the premises and protect its capital investment. (Mangot proffer, (T[2]-135 to 137) SG located a buyer to undertake salvaging this "distressed" venture, but the purchaser was only willing to invest "sweat"

equity, i.e., it was willing to devote its efforts, ingenuity, enterprise and imagination to turn the property around, but expected SG to make the substantial cash investments initially required to effect the development and conversion of the property from distress to profit. (Mangot proffer (T[2]-140 to 141)

SG sold the property to the Kreitman group, a triumvirate of individual developers (Mangot proffer (T[2]-136 to 137), but was unable to negotiate any cash payment from said developers. To induce them to purchase, SG was required to contribute an additional $1,000,000.00 capital in the form of a further building loan. (SG proffered exhibit 73-78) The purchase was 100% financed by SG. (Mangot (T[2]-140 to 141).

Subsequently, for the same reasons noted above, SG found it necessary to further advance a total of $475,000.00. (SG proffered exhibits 79-84) (Mangot proffer (T[2]-148 to 154)

Yet, despite its best efforts, only very minor fractions of interest were received by SG on its investment over the next several years. (Mangot proffer, (T[2]-157)

Thus, in May, 1979, SG assigned to Wells Fargo Bank the mortgage in the then book amount of $4,811,000.00 for the sum of $3,998,411.00. Said transaction closed on May 16, 1979. (SG proffered exhibits 86-88) and (Mangot proffer, (T[2]-162 to 166)

During the entire period of time from the Vacation Concepts default in March, 1973 until the assignment of its mortgage to Wells Fargo on May 16, 1979, SG received only $48,000.00 in interest on its capital investment of $4,360,864.00, and only $14,000.00 in principal

payments. (SG proffered exhibits 85,88A and 88A-1)(Mangot proffer, (T[2]-157, 175 to 176)[4]

Predicated upon the financial data in evidence and proffered, Dr. Smith testified that a reasonable, prudent lender, informed of the Howe transaction, would have ceased to make further loan advances (Smith proffer (T[2]-239 and 245 to 246); that it would immediately have initiated action to recover money already advanced (Smith proffer (T[2]-240); that SG should have been informed of the Howe deal in the initial August 15, 1972 endorsement and should have immediately sought to

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[4] A recapitulation of Mangot's testimony in tabular form shows the following:

| | |
|---|---|
| Sums actually advanced from inception of investment by SG | $4,360,864.00 |
| Principal payments received on account | 14,000.00 |
| Balance of principal outstanding (T[2]-176) | 4,346,864.00 |
| Received from Wells Fargo Bank (May 16, 1979) (T[2]-176) | 3,998,466.00 |
| Net capital investment loss | 348,398.00 |
| Interest on $4,346,864.00 at 6% for 1978 | 260,811.00 |
| Interest on $4,346,864.00 at 6% — 1/1/79 to 5/16/79 | 89,730.00 |
| Total | $ 350,541.00 |
| Interest received — Orlando Tennis World (1978 — 5/16/79) | 48,000.00 |
| Interest balance (T[2]-175 to 176) | $ 302,541.00 |
| Interest on principal, 3/16/73 — 12/31/77) (T[2]-176) | $1,098,325.00 |
| Total interest (T(2)-177) | $1,400,866.00 |
| Total loss of interest and principal (T[2]-177) | $1,749,246.00 |

recover the closing advances of $500,000.00 (Smith proffer, (T[2]-241); and, that CT's actions were the "direct cause" of the losses SG sustained in the transaction, said losses being both loss of interest and loss of opportunity to recover its capital. (Smith proffer, (T[2]242 to 243) The causal relationship between CT's actions and SG's losses, Smith stated as follows:

> "The relationship simply is that if the borrower's act of default had been known soon enough the lenders, SG, could have taken appropriate action to recover their capital; they were in favorable economic times in 1972 and early 1973, and the fact that, they were not informed promptly about those acts of default meant that they were forced into a period which was much less likely for them to be able to recapture their investment which then resulted in their continuing losses." (Sackman proffer, (T(2)-245)

Smith testified that on August 17, 1972, the fair market value of the land alone was $750,000.00. Thus, CT's misrepresentation denied SG the opportunity to stop funding the loan and recover its original $500,000.00 advance in the favorable economic climate of 1972. (Smith proffer (T[2]-249 to 251 and 247 to 249) Further, due to CT's impropriety, SG was lulled into advancing an additional $2,255,000.00, and, thus, thrust into the severely depressed Florida real estate market of 1974-1975, with millions of dollars in capital tied up in a "distressed" piece of property. According to Smith, SG sustained damage of at least $1,750,000.00 as a direct result of CT's actions which created the necessity of SG having to protect its original investment — $2,255,000.00 of which was made in direct reliance on CT's misrepresentations — by salvaging and rehabilitating said property. (Smith proffer, (T[2]-252 to 259)

## ARGUMENT

### A. SG's EVIDENCE IS OF SUCH SUBSTANTIAL QUALITY THAT THE GRANT OF A DIRECTED VERDICT IS A CLEAR ABUSE OF RULE 50(a) FRCP, AND IS SUCH A SERIOUS DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The trial court granted a directed verdict for the express reason that it thought there existed a failure of proof by SG in the area of damages. (T[2]-308 to 309) During the course of discussion of CT's Motion for Directed Verdict, however, the trial judge made passing reference, though he did not specifically deliniate any failure of proof in that area, to liability. (T[2]-303 to 305) Thus, it appears appropriate to deal with the quality of evidence in both areas here.

#### (1) Proper Standard For Granting A Direct Verdict

SG's evidence must be viewed in light of the criteria for granting a directed verdict developed in the federal case law interpreting Rule 50, F.R.C.P. *Boeing* v. *Shipman*, 411 F.2d 365 (5th Cir. 1969). In discussing those criteria, Professor Moore summarizes as follows:

> "As already indicated, the question of the total absence of proof quickly merges into the question of whether the proof adduced is so insignificant as to be treated as the equivalent of the absence of proof. Although the language of the opinions concerning directed verdicts is extremely varied, it is now clear that a verdict will normally be directed where both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion." 5A, *Moore's Federal Practice*, Section 50.02 (1) at 50-24.

Perhaps the most cogent statement of the proper standard is found in the Supreme Court's holding in *Brady* v. *Southern Railroad,* 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed 239 (1943):

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims." *Id.* at 320 US 479 to 480.

Thus, a verdict can properly be directed only where, without reference to witness credibility, the evidence is "strongly and overwhelmingly" in favor of the movant so that there is but one reasonable conclusion as to the verdict. See, e.g., *Shephard* v. *S/S Nopal Progress,* 497 F.2d 963 (5th Cir., 1974); *Sides* v. *Federated Department Stores, Inc.,* 434 F.2d 992 (5th Cir., 1970); and, *Charles Stores, Inc.* v. *Aetna Ins. Co.,* 428 F.2d 989 (5th Cir., 1970).

But, where the quality of the evidence presented is such as to make it impossible to say that there can only be a "one way" verdict, the grant of a directed verdict is not proper. See, e.g., *Roberts* v. *Pierce,* 398 F.2d 954 (5th Cir., 1968); *Guest House Motor Inns* v. *Duke,* 384 F.2d 927 (5th Cir. 1967); *Boeing* v. *Shipman,* 411 F.2d 365 (5th Cir. 1969); *Hackett* v. *Reynolds & Co.,* 577 F.2d 948 (5th Cir. 1978).

More than a "mere scintilla" of evidence is necessary to defeat a Motion for Directed Verdict, however, as the *Boeing* case holds:

> "If there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied and the case submitted to the jury." Id. at 374.

*Boeing* further holds that in determining whether such "substantial evidence" exists, the trial court must consider:

> ". . . all of the evidence . . . in the light and with all reasonable inferences most favorable to the party opposed to the motion." *Id.* at 374. See also, 5A, *Moore's Federal Practice,* Section 50.02(1) at 50-33 and the cases collected there in footnote 25.

Likewise, on appeal as well, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was made, giving that party full advantage of every fair and reasonable inference said evidence justifies. See, e.g., *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); and, *Sulmeyer* v. *Coca Cola Co.,* 515 F.2d 835 (5th Cir. 1975).

#### (2) The Standard Applied To Liability Evidence

Viewed in light of these standards, the trial court's grant of a directed verdict, to the extent it was based upon a perceived failure of proof on liability, was clearly erroneous.

The testimony and documentary evidence establishing liability including that in the proffers viewed in the light most favorable to SG, is as follows:

**(a) The duty**

Pursuant to its letter of instruction (SG-18), SG engaged CT to provide it with "continuations of the status of title" of the mortgaged premises in connection with each construction draw request. Uncontroverted testimony indicates CT had a clear duty, universally acknowledged by "conventional underwriting standards", to have kept SG "fully informed as to any and all matters" that are of public record or of which there is actual knowledge that might affect the mortgage security. Such reports are "standard operating procedure" in construction loan transactions, obtained by a lender to assure that the borrower is taking no action to impair the security of the lender or otherwise constitute a default under the building loan documents. (T[2]-18, 58 to 59, 63 to 64 and 235 to 236) If accurate, they afford the lender an opportunity to make a rational business judgment about the conduct of his borrower vis-a-vis' the purpose of the loan and the strength of the lender's security. (T[2]-18 and 59)

Indeed, even the Agency Agreement between CT and Bettinghaus firmly established such a duty. (SG-8) Schedule A of the title policy also expressly requires such disclosures to the insured. (T[2]-66 to 67) The size of the insurance undertaking coupled with SG's commitment for permanent funding further bolstered CT's responsibility to accurately report changes in the title status. (T[2]-80 to 94) Thus, there is substantial testimony of great quality and weight supporting the existence of the duty alleged by SG.

**(b) The breach of duty.**

In early May, 1972, SG made its application to Bettinghaus, as agent of CT, for 2.8 million dollars in first mortgage title insurance.

Between May 12, 1972 and the closing of June 29-30, 1972, there were several communications between SG and Bettinghaus in connection with the closing of the transaction and pursuant thereto he received and recorded the mortgage documents establishing SG's first lien. He also received the June 30, 1972 letter reciting SG's "conditions precedent" to the final closing including the requirement that CT provide and insure "continuations of the title status" at the time of each request by the borrower for a further mortgage payment advance.

CT agent, Bettinghaus, subsequently issued and delivered to SG defendant's 11 successive duly executed Endorsements, each dated to match a respective mortgage payment advance request, and each was delivered by Bettinghaus expressly "in conjunction with" such respective requests. Bettinghaus prepared each Endorsement solely and entirely to meet the "condition precedent" set out in paragraph 5 of the June 30, 1972 letter.

Between July 10 and 12, 1972, — pursuant to a written "Sale" agreement surreptitiously entered into on April 27, 1972, between the borrower and Howe (SG-52) — Vacation Concepts sold the previously described 3.5 acre portion of the mortgaged premises. Bettinghaus knew SG's mortgage prohibited the sale of any interest in the mortgaged premises. Indeed, he confessed as much in his July 10, 1973 letter to CT Vice President, John Morris. (SG-72) (T[1]-605-608) Yet, the documents representing the sale were kept off the public record. The option to buy the same premises dated July 12, 1972 (the

same date as the warranty deed), was, however, recorded on July 17, 1972, exactly one month before SG was called on for the first construction draw. Bettinghaus likewise tended to the recording of the Option, which, as his "confession letter" of July 10, 1973, makes clear, was simply a decoy document designed to mask the true nature of the Howe transaction. On July 13, 1972, CT, through its files, had actual or constructive knowledge of the Howe transaction through documentation delivered to it by Bettinghaus, including a title binder and endorsement.

Despite this, all of CT's endorsements to SG's policy failed to disclose (1) the recorded Howe Option and (2) the other known non-record documents and details of the Howe deal, even though they clearly affected the title status. SG relied on these Endorsements without knowledge of their fraudulent nature, and made $2,255,000.00 in advances to the borrower.

Each of the 11 Endorsements issued in conjunction with draw requests *should have* reported at least (1) the July 17, 1972 recorded Option, (2) the July 12, 1972 Warranty Deed, and (3) the July 12, 1972 Assignment of Lease and $23,000.00 security. The failure to report these matters to SG amounted to fraudulent concealment of facts which affected the status of title, and the viability of the loan even though they did not affect the first priority of the lien of the mortgage.

While there is a paucity of case law dealing with situations such as is presented by the instant case, *Meyerson* v. *The Lawyers Title Insurance Corp.*, 333 N.Y.S. 2d 33, (1972), is, however, a case substantially on all fours with the action at bar. There, Co-defendant Rosen was represented to the public by defendant-appellant title company as an "approved attorney".

Rosen had been preparing title reports and certifying them for the purpose of issuing Lawyers Title Insurance Policies for a number of years.

Defendant title company had furnished Rosen with blank forms upon which reports of title searches were set forth in detail. At the top of the forms was printed:

> "LAWYERS TITLE INSURANCE COMPANY Home Office — Richmond, Virginia" "REPORT ON TITLE".

The title company sought to avoid the agency of Rosen, however, based on the foregoing documents, the Court stated:

> "In all fairness, nobody who received this report, . . . would have any reason to doubt that he was dealing with the appellant (the title company through a representative)."
>
> ". . . it would have been a relatively simple matter for the appellant to print a warning on the title report to the effect that any transaction of business with Rosen did not bind the appellant but the report is silent in this respect and a reasonable person would be warranted in believing that he was dealing with the appellant, and the trial court so found." Id. at 34 to 35.

The title search submitted at the closing represented the taxes as paid, when they were not and failed to disclose a prior existing second mortgage. The transaction closed with the plaintiff under the belief that it had acquired a valid second mortgage. Thereafter, the first mortgagee foreclosed and plaintiff as a third mortgagee, was wiped out. The true second mortgagee collected $10,000.00 on account on its mortgage. The Plaintiff collected nothing. It thereupon sued the title company and obtained a full recovery of its $35,000.00 investment from the title company.

It is impossible to distinguish the essential facts at bar from those in the *Meyerson* case: (a) In both instances the defendant Title Company dealt with the public through an acknowledged agent, (b) in both instances the respective Title Companies equipped their agents with Title Company blank forms, bearing at top the Title Company name, here: "Chelsea Title & Guaranty Company", Home Office Address: "Home Office — Atlantic City, N.J.", Type of Instrument: "Endorsement"; (c) in both instances, the respective plaintiffs did not receive accurate record title information, — in *Meyerson*, unpaid taxes and an existing 2nd mortgage; at bar, a recorded (decoy) Option, Sale and prohibited Lease Assignment, (d) in both instances, the respective plaintiffs acted in reliance on the misleading information, to their damage.

The *Meyerson* result is consistent with all of the expert testimony as to the duty of CT agent Bettinghaus to report the Howe transaction in full.

Furthermore, it must be noted that even if CT's actions are viewed as negligent, rather than intentional, breaches of its duty, SG is still entitled to recover in fraud for its damages. *Bobby Jones Garden Apartments, Inc.* v. *Suleski*, 391 F.2d 172 (5th Cir. 1968); *Kutner* v. *Kalish*, 173 So.2d 763 (3rd DCA Fla. 1965).

A similar line of cases permitting recovery in fraud for negligent misrepresentation was initiated by Judge Cardozo in *Glanzer* v. *Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922) and followed in *International Products Co.* v. *Erie R.R.*, 244 N.Y. 331, 155 N.E. 662 (1927). See also, *Hendry* v. *U.S.*, 418 F.2d 774 (2d Cir. 1969).

Accordingly, the evidence of CT's fraudulent breach of duty viewed in light of applicable case law, and also

in the light most favorable to SG, is substantial, even overwhelming. A directed verdict was not proper.

**(3) The Standard Applied to Damage Evidence**

The heart of the trial court's decision refusing to allow SG to present evidence of damage is found in its written order of February 7, 1980 (R 1447) (See Appendix D). In summary, the Court ruled that the testimony of Neil Mangot and Dr. Halbert Smith as to damages was not admissible because said testimony was remote, speculative, and the damage was a product of an independent intervening cause. In granting CT's Motion for Directed Verdict, it reaffirmed its earlier ruling holding that SG's evidence "completely failed to support its claim for damages."

Applying the previously discussed standards for granting directed verdicts to the damage testimony proffered, it is clear that the trial court was in error.

CT agreed to keep SG advised of the status of the title after the loan closing. SG wanted to be assured: (a) that the funds advanced were used solely for the purpose of acquiring the land and constructing the motel to improve the property upon which SG held a mortgage; and, (b) that the Borrower did not convey the property to a third party or otherwise deplete the full security assigned to SG without the knowledge and consent of SG. The reason for this is that the lender looks not only to the property as security for its advances but to the behavior of the Borrower, as loan advances are progressively sought, to determine if the project is being duly prosecuted, if the integrity of the security is threatened or if the Borrower's financial position is in jeopardy. Sales or assignments of other security items are, in the mortgage business, classical red flags and

danger signs that a Borrower is in trouble. This is the very reason that a lender requires a current title update prior to each advance of any further funds. If it is discovered that the Borrower has taken any such action, it is a clear danger signal of the Borrower's financial trouble. The obvious action which a lender can take to protect itself in such an instance is to advance no more funds.

CT, through its agent, Bettinghaus, intentionally and willfully or through gross negligence failed to advise SG of the status of the title — particularly the Howe transaction — after the loan closing.

Had SG been advised of the option, warranty deed and lease assignment transfers, it would not have advanced any further monies under the construction loan. SG relied on the continuing false updates of the status of title that were furnished by CT through its agent and, as a consequence, was lulled into taking no action to protect its investment and was induced to make the requested advances to the Borrower.

The borrower defaulted after the Plaintiff had advanced $2,755,000.00. (Witness — Gassert and Mangot) The Plaintiff lost the use of said $2,755,000.00 during the six year life of said loan transaction; was required to seek to mitigate its damage by advancing additional funds in excess of $1,400,000.00; and, suffered a net capital loss of $348,398.00 and damages resulting from the loss of use of its funds amounting to $1,400,866.00 in moratory interest. (SG-88A and A-1)

**(a) Foreseeability of Damage**

The trial Court in its ruling of February 7, 1980, (R 1447), which formed the basis for the directed verdict,

stated that CT could not "reasonably have expected that the entire building and loan arrangement would go sour or that Sackman-Gilliland would be compelled to invest after foreclosure an amount in excess of $1,500,000.00 to keep the project alive."

In light of the trial Court's foregoing statement, the following question must be asked: What result could CT reasonably have expected from its successive misrepresentations, which induced SG to make loan advances of $2,755,000.00, before the Borrower finally defaulted.

CT could only have expected one result from its misdeeds — that by failing to inform SG of the conduct of the Borrower, CT itself, assumed the risk (1) that the building loan agreement would go sour; (2) that SG, following the foreclosure, would be compelled to invest extensive sums to mitigate damages, rehabilitate and complete the project to place it in an income producing position; and (3) that SG would be subjected to the vagaries of a Borrower, who improperly assigned a lease to a third party, optioned and secretly conveyed mortgaged property to said third party and otherwise depleted the mortgage security at a price substantially less than that stated in a purchase option in the lease conveying said premises — in effect, a borrower who was going down the economic drain and, undoubtedly, was headed for default on the loan.

This is precisely what happened in this case. And, it is precisely for the purpose of protecting itself against such a result that any construction lender, SG included, seeks continuing status of title reports in connection with construction draws — a fact well-known to title insurers.

**(b) Independent Intervening Cause**

The trial court in its ruling raised the point that at least some damage was the result of an independent intervening cause — i.e., Vacation Concepts' default in about April of 1973. The court erred to the extent its ruling was based on such a perception of the law and the evidence. First, as stated above, CT cannot seriously contend that SG's damage was not a foreseeable result of CT's breach of duty to provide accurate reports of the status of title which would have alerted SG of the borrower's instability as early as August of 1972. Given the foreseeable consequence of CT's misconduct, it is a well established principle of Florida law that:

> "Foreseeable acts of third persons are not superseding causes which insulate a prior tort feasor from liability as a matter of law, where such acts combine with the tort feasor's negligence to bring about harm to an innocent party; they are merely concurrent causes." *Cooper* v. *IBI Security Service of Florida, Inc.*, 281 So.2d 524 at 526 (3rd DCA Fla., 1973).

Furthermore, the Florida Supreme Court has repeatedly held, in a long series of unchallenged opinions, as follows:

> "It is universally agreed that if damages are caused by the concurring force of a defendant's negligence and some other force for which he is not responsible, the defendant is "evertheless responsible if his negligence is one of the proximate causes of damage." *De LaConcha* v. *Pinero,* 104 So.2d 25 at 27 (Fla. 1958).

This principle is upheld even where the concurring force causing injury is an "act of God". *Atlantic Coast Line R. Co.* v. *Hendry,* 150 So. 598 (Fla. 1933).

Accordingly, even if the acts of Vacation Concepts contributed to SG's damage, they were only a concurring force, acting in combination with the earlier fraudulent misrepresentations of CT, to bring about said damage. As such, they do not amount to an independent intervening cause of damage — especially when one recognizes that Vacation Concepts' acts of default, of which SG became aware in or about April of 1973 (the sewage replevin suit, interest default and many unpaid mechanics lienors), occurred at a point in time some eight months after the initial fraudulent title Endorsement was submitted to SG by CT on August 17, 1972. Indeed, Vacation Concepts' acts occurred, as the record indicates, at least thirty (30) days after SG was induced to part with the last installment of the $2,255,000.00 it advanced in reliance on the eleven fraudulent Endorsements.

**(c) Speculativeness of Damages for Loss of Use of Funds**

SG having been fraudulently induced to invest funds, may measure its damages by the loss of use of the funds invested and of the additional funds reasonably employed to salvage the investment.

It is well established that "interest" as compensation for lost use of funds may be awarded as an element of damages, in addition to recovery of the principal sum.

> "The purpose of awarding interest as damages is to compensate an aggrieved party *for detention of money rightfully due him,* and *to afford him full indemnification or compensation* for the wrongful interference with his property rights." 25 C.J.S., *Damages,* Section 51(1966). (Emphasis added)

The leading Florida case for this general proposition is *Parker* v. *Brinson Construction Company,* 78 So.2d 873 (Fla. 1955), in which the Florida Supreme Court stated:

> "Interest in the more common acceptation of the term is the cost of hiring money or from the lenders point of view, the return for loaning it . . . In its broadest sense, however, *interest is often allowed by way of damages,* such interest being defined as moratory interest". . . Id. at 874. (Emphasis added).

The *Brinson* case allowed interest as damage in addition to recovery of the principal sum which had been wrongfully withheld. No Florida case appears to have addressed the question of whether interest by itself is recoverable — i.e., whether the lost use of funds for a period of time is actionable independent of a suit to recover those funds. However, there is no impediment to such a cause in principle, and courts in other jurisdictions have recognized such a cause of action. See e.g. *May, Inc.* v. *Albany Housing Authority,* 48 A.D. 2d 971, 369 N.Y.S.2d 833 (3rd Dept. 1975; *Agostini* v. *State of New York,* 255 App. Div. 264 5 N.Y.S.2d 732 (3rd Dept. 1938); *Shapiro* v. *Kansas Public Employees Retirement System,* 216 Kan. 353, 532 P.2d 1081 (1975).

Directly in point here is *Surety Savings and Loan Association* v. *National Automobile & Casualty Insurance Co.,* 8 Cal. App.2d 752, 87 Cal. Rptr. 572 (4th Dist. 1970), where the court held that interest as compensation for delay in payment of a principal sum is actionable. Plaintiff was an investor who had made loans to a developer. The developer defaulted on the payments, but plaintiff's efforts to foreclosure were delayed for three months when the developer obtained a preliminary injunction against the foreclosure sale. It

was later held that the developer was not entitled to the injunction, and plaintiff was allowed to recover interest for the loss of the use of its funds for the three months. Said that court:

> "The delay in the sale caused a loss of the use of the money that would have been paid if the sale had not been delayed. *Interest on the money during the time of the delay is a measure of damage for the loss of its use.*" (8 Cal. App.3d at 760, 87 Cal. Rptr. at 576). (Emphasis added.)

In *Great Western United Corp.* v. *Kidwell,* 439 F. Supp. 420 (N.D. Texas 1977), aff'd on other grounds, 577 F.2d 1256 (5th Cir. 1978), plaintiff sougth to challenge an Idaho tender offer statute on ground that it had been preempted by federal law. The court rejected defendant's argument that plaintiff lacked standing because it had not suffered injury in fact, stating:

> "Great Western had produced testimony of John S. Guest, an investment banker, that *delays under all of these state acts inflict an economic cost on the tender offeror by tying up his capital* and significantly jeopardize the success of an offer. *Under these facts,* in the case of Idaho, *Great Western has shown a sufficiently concrete injury* stemming from the enforcement of an allegedly unconstitutional state law. Id. at 427. (Emphasis added).

In the same vein, it is a well-recognized principal of Florida law that pre-judgment interest is allowed routinely on tort claims which arise out of a breach of contract — exactly the situation presented in the instant case. See e.g., *Srybnik* v. *Ice Tower, Inc.,* 183 So.2d 224 (3rd D.C.A., Fla. 1966); *Huntley* v. *Baya,* 136 So.2d 248 (D.C.A., Fla. 1962).

Besides SG's claim for moratory interest' SG claims damages related to its expenses in salvaging the project and completing construction. The case of *United Insurance Company of America* v. *B.W. Rudy, Inc.*, 42 FRD 398 at 405 (USDC, E.D. Pa. 1967) based on facts comparable to those at bar, is instructive on this point and held that the extent of damage in a fraud case raises a "question of actual damages (which is) one of fact."

*United Insurance* was an action by a mortgagee alleging fraudulent representations by a mortgage applicant, builder and real estate appraiser.

Defendants, owners of certain real estate in process of being improved with an apartment building, its builder, and a professional engineer-appraiser, in order to induce plaintiff to make a mortgage loan, delivered certain plans and specifications to that plaintiff and represented that the building was to be constructed in accordance therewith. Simultaneously, they delivered an Appraisal Report stating that the lands and buildings upon satisfactory completion, in accordance with the Plans and Specifications, had a fair market value of $2,275,000.00.

Shortly thereafter, plaintiff, in reliance upon the representations, issued its Conditional Commitment to make a mortgage loan in a principal amount of $710,000.00. Subsequently, the aforesaid defendant engineer-appraiser, to induce plaintiff to make the aforesaid loan, issued a supplemental Appraisal Report in which he certified that he had inspected the apartment project; that it had been completed in accordance with the aforesaid Plans and Specifications; and, that the fair market value of the property was no less than $1,175,000.00

Thereafter, in reliance upon the various representations and warranties in the Loan Application and the respective Appraisal Reports, and relying on the qualifications of the engineer-appraiser, plaintiff made a mortgage loan in the amount of $710,000.00

Subsequent to making the loan, plaintiff learned that the apartment project had not been completed in accordance with the plans and specifications but, to the contrary, had deviated therefrom in many substantial respects, including many substantial omissions and improper installations. Plaintiff instituted action for fraud alleging, among other things, that Plaintiff will be *required to expend,* in order to *protect and preserve its security interest,* sums in excess of $150,000.00 to correct the deviations and to put the apartment project in condition in which it would have been had it been completed as represented by defendants; and *as a further result of defendant's conduct, the value of plaintiff's security has been diminished* to an extent not yet fully determinable.

The respective defendants moved to dismiss the complaint. The Court, denying their motions ruled as follows:

> "Haeberle asserts that since United alleges only a $150,000 loss, there is no damage because subtracting this $150,000 from $1,175,000, Haeberle's appraised value of the apartment house, *leaves an excess of equity over the loan of $710,000. However, without discussing this novel argument, the Court finds the question of actual damages to be one of fact."* Id. at 405 (Emphasis added).

It is submitted that the testimony offered by SG as to damages is both reasonable and substantial. The proffered testimony of Messrs. Mangot and Smith as to damage sustained by SG due to the loss of use of its

funds and the cost of salvaging its capital investment in order to mitigate its losses is not speculative but is, rather, clearly and logically related to the misconduct of CT, and, as the foregoing case discussion demonstrates, they are recoverable elements of damage.

In short, SG's evidence of damage is at least "evidence of such quality and weight that reasonable and fairminded men might reach different conclusions." *Boeing* v. *Shipmen, supra.*

In this regard it must be noted that all such issues as the above, i.e., combining and intervening cause, remoteness, etc., related as they are to the ultimate issue of proximate cause, are for the jury as the trier of fact.

Such an issue may properly be taken from the jury only where the lack of proximate cause is so clear that reasonable men cannot differ. See, e.g., *Blaw-Knox Food and Chemical Equipment Corp.*, v. *Holmes,* 348 So.2d 604 (4th D.C.A., Fla. 1977) Clearly, from the state of the record the issue of proximate cause together with its related issues of intervening cause, combining cause, and remoteness are matters about which reasonable men could differ. Witnesses, Covington, Subin and Smith, have clearly set forth the foreseeability by Defendant of the consequences of its fraudulent acts as well as established a plausible chain of causation of damage. As to whether or not this chain is broken by an intervening cause at any point, or whether the consequences are not foreseeable or are too remote are matters for the jury. See, e.g. *Nicholas* v. *Miami Burglar Alarm Co., Inc.*, 339 So.2d 175 on remand 340 So.2d 981 (Fla. 1976). See also, *McCabe* v. *Walt Disney World Co.*, 350 So.2d 814 (4th D.C.A., Fla. 1977).

Accordingly, it is respectfully submitted that these issues must be submitted to a jury; that evidence proffered by SG in its case in chief is appropriate for their hearing and consideration; and, that the trial court was in error to direct a verdict for lack of substantial evidence of damages.

## CONCLUSION

Where evidence of wrongdoing and the damage it caused are as substantial as that presented by this Petitioner, it is an egregious abuse of judicial authority to deprive petitioner of the right to a jury decision. It is an abuse not only to this Petitioner, but to the concepts of fundamental fairness which are the basis for the Federal Rules of Civil Procedure. The power granted to a trial court by Rule 50(a) should be exercised only with great caution so as to insure, as nearly as humanly possible, that a worthy plaintiff is not deprived of his basic right to trial by jury. Unless our trial judges are inbued with this sense of caution, the integrity of our entire jury system may be forfeit. It is, therefore, respectfully requested that this Court grant SG's Petition for Writ of Certiorari in order that it may, in accord with Rule 17(a), Rules of the Supreme Court, use its supervisory powers to correct the unwarranted departure from accepted judicial standards which was committed by the trial court below and sanctioned by the court of appeals.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 5th day of June, 1981, by U. S. Mail to THOMAS B. DEWOLF, ESQUIRE, 1475 Hartford Building, 200 East Robinson Street, Orlando, Florida 32801; and DANIEL L. MARTIN, ESQUIRE, 14th Floor, 535 Fifth Avenue, New York, New York, 10017.

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# APPENDIX

## APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

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No. 80-5208

---

SACKMAN-GILLILAND CORPORATION, *Plaintiff-Appellant,*

v.

CHELSEA TITLE AND GUARANTY COMPANY, *Defendant-Appellee.*

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Appeal From The United States District Court For The Middle District Of Florida

(March 18, 1981)

Before FAY and VANCE, Circuit Judges, and ALLGOOD, District Judge.*

PER CURIAM:

AFFIRMED. See Local Rule 21.[1]

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[1] *See NLRB* v. *Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970).

* District Judge for the Northern District of Alabama, sitting by designation.

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

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No. 80-5208

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SACKMAN-GILLILAND CORPORATION, *Plaintiff-Appellant,*

v.

CHELSEA TITLE AND GUARANTY COMPANY, *Defendant-Appellee.*

Appeal From The United States District Court For The Middle District Of Florida

**ON PETITION FOR REHEARING**

(April 22, 1981)

Before FAY and VANCE, Circuit Judges and ALLGOOD, District Judge,*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ PETER FAY
Peter Fay
*United States Circuit Judge*

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* District of the Northern District of Alabama, sitting by designation.

## APPENDIX C

A. ***Building Loan Agreement (SG 17)***

Paragraph 5 thereof provides in pertinent part:

"5. The Borrower further covenants with the Lender as follows:

* * *

(d) It will not convey or encumber the premises in any way without the consent of lender except for mortgages or leases which are subordinate to the mortgage and to all advances made and to be made hereunder without any limitation whatsoever. All easements affecting the premises shall be submitted to Lender for its approval prior to the execution thereof by Borrower, accompanied by a drawing or survey showing the location thereof."

B. ***Mortgage (SG 12)***

Paragraphs 10 and 19 thereof provide as follows:

"10. That the mortgagor is indefeasibly seized of said described real estate in fee simple; that the mortgagor has good right and lawful authority to convey said land as aforesaid; that the same are free and clear of all liens and incumbrances whatsoever, except as may be herein elsewhere otherwise expressly provided; that the mortgagor is the owner of the equipment; that the mortgagor will make such further asurances to perfect the fee simple title to the real estate in the mortgagee as may reasonably be required; and that the mortgagor hereby fully warrants the title to said real estate and will defend the same against the lawful claims of all persons whomsoever, except as above stated."

* * *

"19. That the mortgagor will not assign the whole or any part of the rents, income or profits arising from the premises without the written consent of the mortgagee and any assignment thereof shall be null and void; that in

the event of any default by the mortgagor in the performance of any of the terms, convenants and provisions of this mortgage or the note, it shall be lawful for the mortgagee to enter upon and take possession of the premises, with or without the appointment of a receiver, or an application therefor, and to let the same, either in its own name, or in the name of the mortgagor, and to receive the rents, issues and profits of the premises and to apply the same, after the payment of all necessary charges and expenses, on account of the amount hereby secured; that said rents and profits are, in the event of any such default, hereby assigned to the mortgagee; and that upon notice and demand, the mortgagor will transfer and assign to the mortgagee, in form satisfactory to the mortgagee, the lessor's interest in any lease now or hereafter affecting the whole or any part of the premises."

C. ***Assignment of Lessor's Interest as Collateral Security (SG 14)***

Provides in pertinent part on page 2 thereof:

"The Assignor agrees:

* * *

"(f) not to execute any other assignments of said lease or any interest therein or any of the rents thereunder;"

* * *

"(1) not to consent to any assignments of said lease, or any subletting thereunder, whether or not in accordance with their terms, without the prior written consent of the Assignee;"

D. ***Assignment of Rents and Interest in all Leases as Collateral Security (SG 15)***

Provides on page 3 thereof:

The Assignor convenants and agrees: (a) not to make or attempt to make any other assignment of its right, title and interest in any rents (or payments in lieu of rents)

earnings, income, issues and profits which may be or become due and payable under any leases, written or oral, or under any other letting or agreement for the use or occupancy of any part of the premises, or any of the benefits or advantages to be derived therefrom and, (b) not to collect or attempt to collect any prepayment of such rents or other sums, and any such prepayment on the part of any tenant shall be null, void and of no effect as to the Assignee.

## APPENDIX D

The determination of the admissibility of the evidence proffered yesterday afternoon is dependent upon two well-established principles: (1) That one who has committed a wrongful act can be held liable only for those damages that directly and naturally flow from that act, *Williams* v. *Atlantic Coast Line Railroad Co.*, 48 So. 209, 211 (Fla. 1909); *Ballard* v. *Krause*, 248 So.2d 233, 234 (2d D.C.A.Fla. 1971); and (2) That evidence of damages which are based on conjecture and speculation or only remotely related to the act of misrepresentation is not admissible at trial and should not be considered by the jury, *Hall* v. *Western Union Telegraph Co.*, 51 So. 819, 820 (Fla. 1910); *F & B Ceco, Inc. of Fla.* v. *Galaxy Studios, Inc.*, 201 So.2d 597, 598 (3d D.C.A. 1967). A third principle which entwines itself with the first two and accordingly should be considered simultaneously is that a tort feasor cannot be held liable for damages that are due to the effects of an active, efficient, intervening cause. *National Airlines, Inc.* v. *Edwards*, 336 So.2d 545, 547 (Fla. 1976).

Sackman-Gilliland has proffered evidence of damages it asserts were suffered as a result of Chelsea's alleged misrepresentation of matters which were public record or known to exist by Chelsea's agent, H. Knox Bettinghaus. These damages include a loss of principal as well as a loss of interest on the funds that had been advanced. The interest calculation proffered by Sackman-Gilliland runs from March of 1973, when funding of the project was terminated, through May of 1979, when Sackman-Gilliland relinquished its interest in the mortgage. The figure for loss of principal proffered by Sackman-Gilliland results from the loss suffered upon the transfer of the mortgage in May of 1979. Sackman-Gilliland contends that all of these losses were occasioned by the failure of Chelsea, through its alleged agent Bettinghaus, to disclose the transactions between Mr. Patterson, as trustee, and the Knoxville Land Company, involving an option to purchase, a warranty deed and escrow letter, and an assignment of lease executed at the outset of the funding of the construction loan.

The first hurdle over which Sackman-Gilliland must pass is the requirement that the damages claimed must bear a causal connection to the alleged misrepresentation by Chelsea. The law is clear that to be recoverable, the damages must arise out of and be a result of the misrepresented fact. *Pryor* v. *Oak Ridge Development Corp.* 119 So. 326 (Fla. 1928). Where it is uncertain whether the act complained of was the proximate cause of the injury, there can be no recovery of the loss. *Hall* v. *Western Union Telegraph Co.*, 51 So. at 820. Since it is generally within the province of the jury as triers of fact to determine the sufficiency of the causal relationship between the act and the injury, the Court will now only express its doubt that plaintiff has shown any causal connection between their losses and the acts of Chelsea. The evidence introduced so far more properly shows that plaintiff's losses were due to a combination of factors, many of which were under the control of neither plaintiff nor defendant.

The Court, however, does find that the damages introduced in the proffer are too remote to the alleged misconduct of Chelsea to be considered by the jury. Remote damages have been variously defined to be damages that were the unusual or unexpected result, not reasonably to be anticipated from an accidental or unusual combination of circumstances—a result beyond and over which the wrongdoer has no control. *National Airlines, Inc.* v. *Edwards*, 366 So.2d at 547; *Taylor Imported Motors, Inc.* v. *Smiley*, 143 So.2d 66, 67 (2d D.C.A. 1962). In the present case it can hardly be said that the reasonably expected result of Chelsea's alleged misrepresentation would be that the entire building and loan arrangement would go sour or that Sackman-Gilliland would be compelled to invest, after foreclosure, an amount in excess of 1.5 million dollars to keep the project alive. Chelsea could not have known or reasonably expected that these misfortunes would result. Additionally, there is a substantial element of conjecture in the very nature of plaintiff's damages. The claimed losses are dependent upon a number of assumptions

which the Court has difficulty in accepting. First, it would have to be assumed that if the Howe transaction had been disclosed, Sackman-Gilliland would have decided to consider the mortgagors in default. This, of course, would be dependent upon a legal interpretation of the terms of the mortgage agreement in which the Court does not now intend to indulge. Secondly, the assumption would have to be made that the mortgagors would not have cured the default in order to protect their investment. Thirdly, it would have to be assumed that if a default were declared, and if the mortgagors were unable to cure, then Sackman-Gilliland would have gone through with the foreclosure and recovered its full investment. *See Aldon Industries, Inc.* v. *Don Myers & Associates, Inc.*, 517 F.2d 188, 193 (5th Cir. 1975).

There is also a degree of speculation and conjecture in the presumption that Sackman-Gilliland's decision to invest additional money into the project was absolutely necessary to prevent further loss. This implication of Sackman-Gilliland's business judgment leads to an application of the third principle stated above. It is undisputed that the event giving rise to the foreclosure action was the mortgagor's inability to make payments under the mortgage agreement. Had the mortgagor continued the payments on schedule, it is unlikely that any of the subsequent events or losses would have occurred. Thus, it would appear that the acts of the mortgagors as third parties to this suit were the true forces causing the losses, such that any chain of causation flowing from Chelsea's misconduct was broken and could not have been anticipated at the time.

For these reasons, the Court finds that Sackman-Gilliland's proffer of Mr. Mangot's testimony with regard to damages is inadmissible and defendant Chelsea's objection is sustained.

Office-Supreme Court, U.S.
FILED
JUL 2 1981

No. 80-2063

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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SACKMAN-GILLILAND CORPORATION, *Petitioner,*

v.

CHELSEA TITLE AND GUARANTY COMPANY, *Respondent.*

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## RESPONDENT'S STATEMENT OF THE QUESTION PRESENTED

Respondent believes that the real question presented here is whether the U.S. District judge conducting the trial, in granting a Directed Verdict in favor of the Respondent (Defendant below) at the close of the Petitioner's (Plaintiff below) case and the Court of Appeals for the Fifth Circuit, in affirming the Order Granting Directed Verdict, so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

Petitioner's statement of the question presented contains a lengthy recitation and characterization of the evidence presented at the trial. The statement of evidence contains inaccuracies and omissions which renders the recitation of evidence misleading. Respondent therefore feels compelled to correct some of those inaccuracies and omissions.

The conveyance to a third party referred to in subparagraphs (c), (d) and (f) under "Petitioner's Statement of the Question Presented" was not a full conveyance since the deed was held in escrow to be delivered only upon the exercise of the option which could only take place after the construction mortgage of Sackman-Gilliland was due in October of 1973. It did not diminish the mortgagee's security since the entire arrangement was subject to the first lien of the construction mortgage and the borrower, Vacation Concepts and William Patterson, had full control of the property for purposes of constructing and operating the project. The transaction involved 3.5 acres of a total 87 acre tract and was the site of one of the two motels to be constructed as part of the project. The interest of the optionee was eliminated in

the foreclosure proceeding and was never a factor in the borrower's default or in the value of the property acquired by foreclosure.

Sackman-Gilliland's right to declare a default as referred to in sub-paragraph (g) of the Petition was subject to the terms of the Building and Loan Agreement, which granted the borrower the right to remedy any default, even if the transaction did constitute a default. The statement in sub-paragraph (h) that the borrower defaulted in the payments on the loan is inaccurate. The loan required no payments until the construction loan was due in September of 1973, and the default claimed was in the payment of interest in March of 1973. The default occurred because Sackman-Gilliland Corporation ceased funding the loan and thereby ceased paying itself the interest which it was paying under each construction draw.

The statement in sub-paragraph (h) of the Petition that the project, during the foreclosure period suffered extensive deterioration requiring an expenditure of an additional $1,400,000.00 by Sackman-Gilliland Corporation is inaccurate and misleading. During the entire course of the foreclosure the project was open for business and was being operated and managed by Mr. Stanley Kreitman, who had been hand picked to succeed to the interest of the borrower. The $1,400,000.00 referred to in sub-paragraph (g) of the Petition was advanced after the foreclosure was completed, by Sackman-Gilliland Corporation, to the Kreitman group to complete construction of the amenities and to convert the project from a motel and campground into the elaborate facilities of "Orlando Tennis World."

The statement in sub-paragraph (i) that Sackman-Gilliland Corporation was unable to find a buyer who would agree to purchase the property for less than 100% financing, etc. is misleading in that the evidence does not show any effort by Sackman-Gilliland Corporation to find a buyer or even to place the property on the market for sale. After foreclosure the evidence shows that Sackman-Gilliland Corporation converted its arrangement with Mr. Kreitman into a new arrangement under which Sackman-Gilliland Corporation would participate in any operating profits, any profit upon sale of the premises or any excess funds through refinancing.

Respondent contests the statement in sub-paragraph (j) of the Petition that Sackman-Gilliland Corporation suffered the losses set forth therein as a result of misrepresentation on the part of Chelsea Title and Guaranty Company. The evidence clearly shows that the failure to report the Howe transaction in the endorsements to the title policy did not result in any damage to Sackman-Gilliland Corporation and there was a complete failure of evidence to show any damage to Sackman-Gilliland Corporation as a result of the Howe transaction.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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v.

CHELSEA TITLE AND GUARANTY COMPANY, *Respondent.*

---

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### REASONS FOR DENYING THE PETITION

In granting the Motion for Directed Verdict at the close of the Plaintiff's case, the trial judge did not depart from the accepted and usual course of judicial proceedings. Therefore, the Petition for Writ of Certiorari should be denied.

The trial judge carefully considered the evidence presented by the Plaintiff, Sackman-Gilliland Corporation (SG), in the light most favorable to the Plaintiff.

He considered the Motion pursuant to Rule 50(a) of the Federal Rules of Civil Procedure and in accordance with the legal authorities which provide guidelines for the determination of a motion for directed verdict. The court's comments, which were recorded in the transcript, were as follows:

> "THE COURT: All right, the Defendant's Motion for a directed verdict is granted because the evidence presented by Sackman-Gilliland is insufficient to establish a prima facie case under the evidence and the applicable law.
>
> Now, when viewed in the light most favorable to the Plaintiff the evidence completely fails to support the claim for damages." (T[2]-308 to 309).

After considering the record, the briefs of the parties and argument of counsel, the Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the trial judge in a per curiam Order dated March 18, 1971.

The trial judge's Order Granting Directed Verdict correctly applied the law to the evidence in this case. Considered in the light of the authority set out in *Brady* v. *Southern Railroad*, 320 U.S. 476, and *Boeing* v. *Shipman*, 411 F.2d 365 (5th Cir. 1969), the evidence adduced by SG has failed to establish a case for two reasons: (1) The evidence clearly shows that the matter allegedly misrepresented (that is the Howe option transaction) did not cause SG any loss or injury whatever; and (2) The evidence proffered by SG as to its damages was so remote, speculative and irrelevant as to be inadmissible under the rules of evidence.

## STATEMENT OF THE CASE

Respondent disagrees with a number of the statement of facts set forth in the Petitioner's Statement of the Case and will therefore set forth those most significant statements which require correction.

1. On page 3 of the Petition, Petitioner states "accordingly, SG was not allowed to introduce any damage testimony." This statement is not quite correct. The correct statement would be that SG elected to rely on the proffer of testimony and did not offer into evidence any other damage testimony. The Court held that the damage testimony proffered was inadmissible. (T[2]-287 to 288).

2. Petitioner's statements on pages 4 and 5 of the Petition concerning CT's involvement in the mortgage loan closing imply that CT was participating in the closing in some capacity and agreed to certain undertakings. This is inaccurate. SG dealt with H. Knox Bettinghaus, Esquire, as attorney for the Borrower, throughout the negotiations for the loan and during the loan closing. CT's only involvement occurs because Mr. Bettinghaus was an agent of CT for purpose of writing title insurance binders and title insurance policies, pursuant to an agency agreement. CT's only agreements are those set forth in the title insurance binder and the mortgagee title insurance policy actually issued in its name by Mr. Bettinghaus to SG. The letter of June 30, 1972, referred to on page 5 of the Petition actually sets forth instructions to Mr. Bettinghaus, as attorney for the Borrower, concerning disbursements of funds and also instructed him, as a condition to closing the loan, as follows:

> "5. That you are prepared to furnish the Lender with written continuations of the status of title not less than once a month when request is made by the

> Borrower, Vacation Concepts, Inc., for an advance pursuant to the Building and Loan Agreement executed by the Lender and Borrower. Such continuations, it is to be acknowledged, are to be insured by the title company, Chelsea Title & Guaranty Company."

3. The letter also contains other instructions to Mr. Bettinghaus, as attorney for the Borrower, concerning the payment of taxes, the payment of outstanding mortgages and recording of the documents. The letter contains the paragraph:

> "Per our agreement, you are to telephone me Wednesday, July 5, 1972, to advise me whether the aforementioned conditions precedent can be accomplished and on your assurance, I will arrange for the release of the monies under the payment authorization executed by your clients." (Exhibit 18)

Mr. Bettinghaus complied with the terms of the letter and did issue a CT mortgagee title insurance binder and policy insuring the first lien status of the SG mortgage. He complied with the requirement of issuing continuations of the status of title by forwarding to SG, upon request, when each construction draw was due, an endorsement to the title policy which simply stated: "The effective date of this policy is amended to read _____", using the date of each construction draw.

4. On page 6 of the Petition SG uses a sub-heading: "The Borrower's Conveyance to a Third Party of SG's Mortgaged Security." This heading is misleading and SG's statement of facts concerning the Howe transaction incorrectly omits a number of pertinent facts. The Howe transaction was structured by Mr. Bettinghaus (the Borrower's attorney) so that it would not constitute a conveyance until after the SG mortgage was to have been paid. (Exhibit 72) The warranty deed executed by the

Borrower to Howe was placed in escrow with Lenore Industries, Inc., pursuant to an escrow letter dated July 12, 1972, (Exhibit 63) to be delivered to Howe only upon the exercise of the option (between October 1 and October 15, 1973).

5. On page 6 of the Petition SG states:

> "On July 13, 1972, CT was informed of the Howe transaction by letter from its agent, Bettinghaus, enclosing copies of the CT title insurance binder he had issued to Howe covering said 3.5 acres, dated July 10, 1972 (SG-61), a binder endorsement and CT's premium fee for the Howe title insurance."

This statement seems to imply that the CT regional office was aware that the Howe title policy and the SG mortgage title policy were somehow related. There is no evidence in the record to indicate that the CT home office or regional office had any reason to know that the two policies were related to the same project.

6. This same implication appears on page 7 of the Petition by insertion of "(SG)" in the quoted portion of the letter from Bettinghaus to the CT home office dated July 10, 1973. This parenthetical reference does not appear in the letter and was supplied by SG in the petition.

7. On page 11 of the Petition under sub-paragraph (g) "The Foreclosure," SG refers to the foreclosure judgment "in the amount of $3,586,727.00." Actually the foreclosure judgment was never offered in evidence by SG and it is not a part of the record in this case. There is no testimony in the record that Respondent can find that even refers to the amount of the foreclosure judgment.

8. SG also states:

> "SG's bid was $3,000,000.00 (T[2]-129 to 130), though the property was of much less value due to the deep real estate depression at that time."

There is no evidence in the record as to the market value of the property in September of 1974, and no basis for any presumption that the property was worth less than $3,000,000.00, which was the amount of the SG bid.

9. SG's reference to Internal Revenue Service rules creating potentially severe tax consequences for mortgagees acquiring property with a bid significantly less than the amount loaned, is also an incorrect statement. According to the legal opinion quoted by the witness, Neil Mangot, (T[Vol. L]-132 to 133) SG would have a tax problem only if, and to the extent that, the amount of its bid was less than the fair market value of the property at the time of the foreclosure sale. If SG actually considered that the fair market value of the property at the time of the sale was less than $3,000,000.00, say, $2,000,000.00, then it could have bid $2,000,000.00 and not had a tax problem. It could also have saved a considerable sum in documentary tax stamps. After the foreclosure sale the property was placed on SG's books at a value of $3,000,000.00. Actually, there was no appraisal offered in evidence as to the value of the property in September of 1974, the time of the foreclosure sale. There is no reason to believe from the evidence that the property, the construction of which was substantially complete, and which had been appraised when the loan was originated at in excess of $5,000,000.00 upon completion, was worth less than $3,000,000.00 in September of 1974.

10. SG's statements beginning on page 11 of the Petition under the sub-heading: "SG Efforts to Salvage the Investment and Its Damages" is based on the proffered testimony of Neil Mangot, which proffer was rejected by the Court and the testimony held to be inad-

missible. All objections to the testimony were reserved until the proffer was concluded and the Court ruled on CT's objection to the proffer before any cross-examination of the witness was undertaken. Aside from questions as to the lack of foundation for the summary testimony given by the witness, Neil Mangot, it is clear that the testimony relates to transactions occurring after SG acquired the property in the foreclosure sale in September of 1974. The testimony deals with SG's sale of the property to the Kreitman group in December of 1974, its loan to the Kreitman group of additional sums over a period of four years totalling $1,400,000.00 and the ultimate sale of the Kreitman mortgage to a creditor bank in reduction of debt. Following this proffered testimony, the Court ruled that the testimony was inadmissible as proof of damages because it was too remote and speculative and not related to the alleged misrepresentation.

11. The essential facts as to SG's claim for damages are:

a. SG advanced $2,255,000.00 to Vacation Concepts, Inc. under the construction loan after the date of the Howe option transaction.

b. SG foreclosed on this mortgage and was awarded a final judgment establishing that it had a first lien on the mortgage property. The interest of Howe was foreclosed on default and did not cause any loss or damage to SG.

c. SG acquired the property at the foreclosure sale based on a bid of $3,000,000.00, which sum was as much or more than it had invested in the mortgage.

## ARGUMENT

**The Trial Court's Grant Of A Directed Verdict Under Rule 50(a) F.R.C.P., was Correct And Is Not Such A Serious Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.**

In ruling on the Defendant's Motion for Summary Judgment at the close of the Plaintiff's case the Court stated that the evidence, when viewed in the light most favorable to the Plaintiff, did not support the Plaintiff's claim for damages.

SG's case as to liability failed because even if there was sufficient evidence of the alleged fraudulent misrepresentation to go to the jury, it is still clear that the matter allegedly misrepresented was not material to SG's claim of loss. No evidence was presented that the Howe option transaction caused SG any loss whatsoever. A misrepresentation is actionable only if the Plaintiff's claim of loss arose out of the matter misrepresented. *Day* v. *Avery*, 548 F.2d 1018 (D.C. Cir. 1976); *Sutton* v. *Gulf Life Insurance Co.*, 189 So. 828 (Fla. 1939); *Pryor* v. *Oakridge Dev. Corp.*, 119 So. 326 (Fla. 1928); *Evans* v. *Gray*, 215 So.2d 40 (Fla. 3d DCA 1968); RESTATEMENT (SECOND) OF TORTS, §548A (1977).

SG's reliance on the case of *Meyerson* v. *The Lawyers' Title Insurance Corp.*, 333 N.Y.S. 2d 33 (1972) is misplaced. The *Meyerson* case actually illustrates the essential elements necessary for recovery for misrepresentation which are lacking in the case sub judice. The *Meyerson* suit was based on misrepresentations as to the condition of title to real estate, and was brought in tort of necessity because no title insurance policy was ever issued. An attorney, who was an agent for policy writing purposes, of Lawyers' Title rendered a report of title to

a prospective mortgage lender in which he specifically stated that taxes on the property to be mortgaged had been paid and that the mortgage being given as security for the loan constituted a second lien on the property. As it turned out the taxes had not been paid on the property and the mortgage of the Plaintiff was actually subject and subordinate to the prior second mortgage. When the prior second mortgage foreclosed the Plaintiff's mortgage was wiped out and the Plaintiff suffered a total loss of his investment. The representations were obviously material and the damages suffered by the mortgage lender related directly to the matters misrepresented. Contrarty to the situation in *Meyerson*, in this case, the matter allegedly misrepresented was a subordinate interest which was eliminated in the SG mortgage foreclosure and did not result in any loss or damage to SG.

Testimony proffered by SG at the trial shows that at the time SG took title to the property at the foreclosure sale, it had no damages at all. SG acquired the property for a bid of $3,000,000.00 and its total investment at that time was less than $3,000,000.00. SG's argument, through the witness Mangot, that its bid was made on the basis of an income tax consideration is irrelevant. The value of the property is established at the time of the foreclosure sale at not less than the amount bid. This is established law and SG cannot go beyond the date of foreclosure or question the minimum value of the property as being equal to its bid. *Provident National Bank* v. *Thunderbird Assoc.*, 364 So.2d 790 (Fla. 1st DCA 1978); *City Building Corp.* v. *Farish*, 292 F.2d 620 (5th

Cir. 1961). In the *City Building Corp.* case, the Fifth Circuit Court of Appeals stated at page 622:

> "A creditor who causes a debtor's property to be sold, and becomes a purchaser at a judicial sale, stands in the same position at and after the sale of the property as would a stranger whose bid was accepted. *City of Sanford* v. *Ashton*, 131 Fla. 759, 179 So. 765.
>
> Since the creditor acquires the same rights as a high bidding stranger would acquire, it is proper to impose upon it the same duties and obligations as are cast upon a third party successful bidder and to hold it to the amount of its bid."

SG's argument about tax considerations is invalid anyway as pointed out previously on page 6.

The proffered testimony of damages based on the events extending over a four year period subsequent to the foreclosure sale, in addition to being improper for the reasons stated previously, is too remote and speculative to be admitted into evidence and the trial court was correct in sustaining the objection. *Williams* v. *Atlantic Coastline R.R. Co.*, 48 So. 209 (Fla. 1909); *Ballard* v. *Krause*, 248 So.2d 233 (Fla. 2d DCA 1971); *Hall* v. *Western Union Tel. Co.*, 51 So. 819 (Fla. 1910); *F & B Cedo, Inc.* v. *Galaxie Studios, Inc.*, 201 So.2d 597 (Fla. 3d DCA 1967); *Aldon Ind. Inc.* v. *Don Meyers & Assocs. Inc.*, 517 F.2d 188 (5th Cir. 1975).

SG's proffered testimony of damages also suffers from other deficiencies:

a. Mr. Mangot's testimony was not based on matters of which he had personal knowledge.

b. There was no basis shown for the recovery of prejudgment interest. *Nationwide Mutual Insurance*

*Co.* v. *Griffin*, 222 So.2d 754 (Fla. 4th DCA 1969); *Peter Marich & Assocs. Inc.* v. *Powell*, 365 So.2d 754 (Fla. 2d DCA 1978).

c. There was no causal relationship shown by the evidence between the matter allegedly misrepresented in the claims of damages about which the witness testified.

After the Court ruled that the proffered testimony was inadmissible, SG had no evidence of damages in the case, and elected to rest rather than to proceed on other theories of damages. Therefore, at the conclusion of the Plaintiff's case there was no evidence of damage and the Court properly directed a verdict in favor of CT.

## CONCLUSION

It is respectfully submitted that Petitioner has not shown any departure from accepted judicial standards committed by the Trial Court or by the Fifth Circuit Court of Appeals in affirming its Order, and the Petition for Certiorari should, therefore, be denied.

Respectfully submitted,

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**Certificate Of Service**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 2nd day of July, 1981, by U.S. Mail to Arthur J. Ranson, III, Esquire, 538 East Washington Street, Orlando, Florida, 32801.

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Office-Supreme Court, U.S.
FILED
JUL 13 1981
ALEXANDER L. STEVAS,

No. 80-2063

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

SACKMAN-GILLILAND CORPORATION, *Petitioner,*

v.

CHELSEA TITLE AND GUARANTY COMPANY, *Respondent.*

**ON PETITION FOR
A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

## SACKMAN-GILLILAND CORPORATION'S REPLY TO CHELSEA TITLE AND GUARANTY COMPANY'S BRIEF IN OPPOSITION

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## STATEMENT OF THE SCOPE OF SG'S REPLY

Petitioner, Sackman-Gilliland, asserts that a fair reading of the testimony and documentary evidence contained in the record of this cause supports the position set forth in its Petition. Therefore, it will not engage in a step-by-step refutation of the evidentiary arguments advanced by Respondent, Chelsea Title in its Brief in Opposition. It suffices to say that CT's arguments do not give SG the benefit of *any* favorable inferences to be drawn from the evidence and, thus, fail to deal with that evidence in the light of the standard established for the disposition of a motion for a directed verdict. See, e.g., *Brady* v. *Southern Railroad,* 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943).

There is a legal argument advanced by the Respondent as to the effect to be given the bid made by SG at the foreclosure sale of the subject property. There is absolutely no indication that the trial court paid any heed to said bid in granting the directed verdict. (See Appendix D on Page 92-11a of SG's Petition) Thus, any argument as to the effect of the bid is not responsive to the issue on appeal. In order to avoid confusion, however, the fallacy of CT's position on this point must be revealed.

## ARGUMENT

CT would have this Court believe that there is a conclusive presumption in Florida law that the bid price at a foreclosure sale equates to the value of the property. Because SG bid $3,000,000.00 at said sale, CT reasons that such was the actual value of the property and SG sustained no damage. CT's reasoning is fallacious because there is no such presumption which has application in a suit for fraud and misrepresentation.

**A. The Nature of the Presumption Arising From a Foreclosure Sale Bid.**

Questions pertaining to presumptions are always governed by the law of the forum. *United Mercantile Agencies* v. *Bissonette,* 19 So.2d 466 (Fla. 1944). Under Florida law, a presumption is a preliminary "rule of law" which may be made to disappear by rebuttal evidence. A presumption is not itself "evidence." Furthermore, when there is positive evidence on the fact sought to be established by a presumption, the necessity for using the presumption disappears. *Locke* v. *Stuart,* 113 So.2d 402 (1st DCA Fla. 1959); *Mercury Cab Owners' Association* v. *Jones,* 79 So.2d 782 (Fla. 1955).

The presumption arising from the price bid at a foreclosure sale is a creature of Florida statutory law. Thus, proper application of the presumption demands understanding of its public policy basis. Unless that policy is involved in the case at bar, the presumption should not be applied. This is so because:

> "The existence of any given presumption and its exact nature and effect are not determined by the law of evidence but by the policies of that portion of the substantive law to which the presumption relates . . . Some rebuttable presumptions have no logical core, but rest on some policy of that particular branch of the substantive law with which they are connected." Chafee, 35 *Harv. L. Rev.* 310-313 (1921); and, see Morgan, "Instructing the Jury Upon Presumptions and Burden of Proof," 47 *Harv. L. Rev.* 59 (1933)

The only public policy purposes under Florida law for the presumption as to the amount bid at a foreclosure sale is to provide adequate consideration to support the title of the property in the purchaser. Also, in a deficiency suit the amount bid may be considered as one of the factors in valuation of the property. *Kurkjian* v. *Fish Carburetor Corporation,* 145 So.2d 523, 526 (Fla. 1st DCA

1962). The presumption, as established in F. S. § 45.031(7), provides as follows:

> "VALUE OF PROPERTY. The amount of the bid for the property at the sale *shall be conclusively presumed to be sufficient consideration for the sale.* Any party may serve an objection to the amount of the bid within ten days after the clerk files the Certificate of Sale. If timely objections to the bid are served, the objections shall be heard by the Court. Service of objections to the amount of the bid does not affect or cloud the title of the purchaser in any manner. If the case is one in which a deficiency judgment may be sought, an application is made for a deficiency, *the amount bid at the sale may be considered by the court as one of the factors in determining a deficiency under the usual equitable principles.*" (Emphasis added)

F. S. § 45.031(7) merely codifies what the common law was prior to the enactment of its predecessor statute, F. S. § 702.2(5).

The Court is urged to note that neither the current statute nor its predecessor establishes a conclusive presumption as to fair market value. It simply provides that the foreclosure sale price will be deemed adequate consideration to support title. This is a far cry from equating the bid with actual market value as the Florida courts have always recognized. For example, in *Maudo, Inc.* v. *Stein,* 201 So.2d 821 (3rd DCA Fla. 1967), a deficiency action, a mortgagee successfully bid $500 for property with an actual value of $55,000 to $60,000. While there was no attack on the sale based on adequacy of sale price, by operation of F.S. § 45.03(7) and/or its predecessor statute, the sale price, absent a timely objection, would have been conclusively presumed *adequate to support title* in the mortgagee. Significantly, in an earlier appeal from the same case, the *Maudo* court held, however, that the $500 bid did *not* establish value for purposes of assessing a deficiency and the mortgagor was allowed to introduce

evidence as to *actual market value. Maudo, Inc.* v. *Stein,* 171 So.2d 403 (3rd DCA Fla. 1965).

Likewise, *Matz* v. *O'Connell,* 155 So.2d 705 (2d DCA Fla. 1963), held that the trial judge erred in ruling that the amount bid at the sale conclusively established value under the language of F.S. Sec. 702.02(5). Construing the statute, the Court stated:

> "Section 702.02(5), Florida Statutes, F.S.A., enacted subsequent to the decision cited, *does nothing more than eliminate the necessity of a confirmation by the court of the sale when no objection thereto has been filed.* Thus, by operation of the foregoing statute, when no objection is filed it is presumed conclusively that the sale price is adequate *to support the title to the property in the purchaser,* even without a confirmation of the sale by the court." *Id.* at 707 (Emphasis added)

Thus, the Court should not give to this statutory presumption application more far-reaching than that allowed by Florida law. The simple fact is that no law conclusively equates bid price to value.

**B. The Application of the Presumption.**

Thus, the presumption is to apply in suits between debtors and creditors where validity of the sale is challenged for inadequacy of the price, and also, in deficiency suits by creditors to establish the difference between the amount of damages awarded in a Final Judgment and the fair market value of the subject property. See, e.g., *Maudo, Inc.* v. *Stein, supra;* and *Matz* v. *O'Connell, supra.*

No Florida case or statute authorizes application of this presumption in any other context than that discussed above. This is demonstrated by the only cases on this issue cited by CT. For example, *Provident National Bank* v. *Thunderbird Associates,* 364 So.2d 790 (1st DCA Fla. 1978) involved a *suit for a deficiency* judgment by a *second*

*mortgagee against a mortgagor and guarantor.* The second mortgagee sought to show that the property bought at the foreclosure sale was of lower value than its bid and that its deficiency should thus be greater than the difference between the bid price and the amount of the Final Judgment. The *Provident* Court rejected the mortgagee's theory and held for purposes of establishing a *deficiency:*

> "Although the amount for which mortgaged property sells at a properly conducted foreclosure sale is *not conclusive as to the value of the property* nor the right to a deficiency judgment, the *deficiency* may not exceed the difference between the amount for which the property so sold and the amount of the indebtedness secured by the final judgment of foreclosure." *Id.* at 795 (Emphasis added)

In light of the prior discussion of the nature of the presumption arising from the bid price, the *Provident* ruling stands clearly for three principles: (1) The bid price is *not* presumed equal to value; (2) The effect given to the bid price is to place a ceiling on the amount of a deficiency decree and (3) the effect is implicitly *limited to deficiency actions. Provident* most certainly does *not* mean that a third party accused of fraud may rely on the bid price to establish value so as to defeat a damage claim. Likewise, the other two cases cited by CT, *City of Sanford* v. *Ashton,* 179 So. 765 (Fla. 1938) and *City Building Corp.* v. *Farrish,* 292 F.2d 620 (5th Cir. 1961) also provide no support for CT's argument.

In *Ashton,* a judgment creditor had City property sold at a sheriff's sale and bid it in for $1000. The City challenged the sale on the ground that the consideration paid was inadequate since the City valued the property at $100,000. The Court's denial of the City's challenge did not in any way equate the bid price to the value of property but merely upheld the sanctity of the sheriff's sale by ruling that, absent a showing of fraud or other similar defect in the sale, the amount bid was sufficient con-

sideration to support title in the judgment creditor *regardless* of whether the bid bore any relation to actual value. In that regard the Court wryly noted that: "Bidders and buyers at execution sales usually bid and buy to make a profit." *Id.* at 767.

The same basic holding was rendered in *Farrish*. There a tenant's trustee in bankruptcy challenged the adequacy of the sale price paid by the landlord for tenant's property sold at a court-ordered distress sale. The Fifth Circuit, applying Florida law and the *Ashton* precedent, held that even if the bid were inadequate the sale would stand:

> "In the absence of fraud, misconduct, mistake, accident, surprise, or irregularity, a judicial sale will not be set aside where the consideration for the property sold is inadequate." *Id.* at 622.

Thus, like *Provident, Farrish* and *Ashton* simply do not establish any presumption relating bid price to actual value, the purpose of the latter two cases being to preserve judicial sales, regardless of bid price, where there is no misconduct involved in those sales. In fact, no Florida case or statute exists which conclusively presumes that the bid price equates to value. Rather, the bid price is only (1) "some evidence of value" for purposes of determining a deficiency amount; or, (2) presumed sufficient to provide adequate consideration for a regularly conducted judicial sale without regard to actual value of the property purchased.

There is no authority for the proposition that market value conclusively equates to the bid price. Perhaps the reason why no such rule exists is best set forth in *Bobby Jones Garden Apartments, Inc.* v. *Connecticut Mutual Life Insurance Co.*, 202 So.2d 226 (2nd DCA Fla. 1967):

> "Finally, we are convinced that a *judicial holding that the bid price* at the foreclosure sale *conclusively establishes the market value* of the property for purposes of deficiency decree would expose the foreclosure pro-

> cedure to shocking and pernicious inequities in many cases. *It is common knowledge that frequently mortgagees do not bid anywhere near the market value of the property or the amount of the obligation at foreclosure sales.*" *Id.* at 230. (Emphasis supplied)

Indeed, the bid price is often given little or no effect in a deficiency suit. *Vanguard Const. Co.* v. *Lewis State Bank,* 348 So.2d 72 (1st DCA Fla. 1977) is a case in point. There the Bank sought a deficiency. The issue of value of the property and the Bank's evidence of same was squarely before the Court and it held:

> "The amount of the appraisal which the Bank secured before making the loan did not, as a matter of law, foreclose the Bank from proving in deficiency proceedings that the market value of the property foreclosed and bought in for a nominal bid was less than the appraisal." *Id.* at 74.

Thus, despite the availability of the presumption, a mortgagee may be allowed to introduce evidence to show a market value different from the bid price.

Likewise, as to the presumption of F.S. § 45.031(7) and its predecessor § 702.02, there is no authority which makes it applicable outside of the narrow context of suits for deficiencies, or suits challenging the efficacy of judicial sales. Recalling Prof. Chafee's above-quoted article, there is no public policy reason why the presumption should be applied in any broader context.

**C. Assuming, Arguendo, a Presumption Exists, SG is Entitled to Rebut It.**

There is Florida case law based on F. S. § 45.031(7) or its predecessor that the amount bid by a mortgagee at a foreclosure sale is "one factor" or "some evidence" to be considered in determining market value for purposes of determining the Mortgagee's entitlement to a deficiency decree and the amount of the decree. However, the

bid is not conclusive on the issue of market value. See, e.g., *Builders Finance Co. Inc.* v. *Ridgewood Homesites, Inc.*, 157 So.2d 551 (2d DCA Fla. 1963); *Kurkjian* v. *Fish Carburetor Corp., supra;* and, *Spencer* v. *American Advisory Corp.*, 338 So.2d 62 (3rd DCA Fla. 1976). As to the effect of evidence of the sale price in a deficiency suit, it has been held as follows:

> "The rule is clearly that the price bid, and for which realty is sold, at a mortgage foreclosure sale, although conclusive with regard to the efficacy of sale in absence of timely objection thereto, is not necessarily conclusive with regard to the value of property sold on application for a deficiency degree . . . *The proper rule is that upon the introduction of the evidence of the sale price, the defendant has the burden of going forward and presenting such evidence as he shall find proper concerning the fair market value of the property.* In the absence of such evidence, the trial court has the power to act upon the assumption that the sale price reflects the fair market value. *Fara Manufacturing Co., Inc.* v. *First Federal Savings & Loan Association of Miami,*" 366 So.2d 164 (Fla. 3rd DCA 1979). (Emphasis added)

The rule embodied in *Fara* has developed wholly within the context of deficiency suits. It does not exist elsewhere in Florida law. There is no basis for its application in a suit for fraud.

Assuming, however, that this presumption were to be applied to the instant fraud case, several points must be made.

First, *Fara Manufacturing* makes clear that evidence of the bid price introduced by one party merely shifts the burden of going forward with the evidence to the party who seeks to show that it is not equal to the fair market value. It is incumbent upon that party to introduce evidence of actual market value — i.e., to rebut the presumption of value created by the bid price.

In the case at bar, CT seeks to use evidence of the sale price against SG to defeat its damage claim. Since CT seeks to rely on the presumption of value arising from SG's bid, SG is entitled to introduce evidence to rebut the presumption and establish actual value. SG's right to do this is fundamental to the law of evidence as applied in Florida and elsewhere. *Locke* v. *Stuart, supra;* Chaffee, 35 *Harv. L. Rev.* 310-313 (1921); Morgan, "Presumptions," 12 *Wash. L. Rev.* 255 at 260-61 (1937).

Indeed, since the presumption as it has arisen in deficiency suits is rebuttable, if the Court were to deny SG the right to have the trier of fact consider its positive rebuttal evidence of value, then the Court would be taking the wholly unprecedented step of converting an otherwise rebuttable presumption into a conclusive presumption that bid price equals market value.

Such action violates the rule that presumptions are established by the law of the forum since there is no such conclusive presumption in Florida. *United Mercantile Agencies* v. *Bissonette, supra.* Furthermore, in the face of SG's positive evidence of value there is no reason to apply any presumption under Florida law. *Locke* v. *Stuart, supra.* Certainly no public policy dictates the application of such a presumption to this case.

Furthermore, it is well recognized that the bid price usually deviates from actual market value. *Bobby Jones Garden Apartments, Inc.* v. *Connecticut Mutual Life Ins. Co., supra.* SG's evidence is that the market value was far less than the bid price. That being the case, to impose upon SG a conclusive presumption that the bid price equals market value is violative of due process. In this regard, it has been held that:

> "Due process interdicts the adoption by a state of an irrebuttable presumption, as to which the presumed fact does not necessarily follow from the proven fact." *Andrews* v. *Drew Municipal Separate School*

*District*, 507 F.2d 611 (5th Cir. 1975); see also *Cleveland Bd. of Education* v. *LaFleur*, 414 U.S. 632 (1974).

Additionally, it would be error to utilize a presumption to dispose of this case in the face of positive evidence contrary to the presumed fact. Under Florida law, the trier of fact should not weigh a presumption in deliberating on a case but should weigh the evidence and the evidence only. *McKenna* v. *State*, 161 So. 561 at 563 (Fla. 1935). If the *McKenna* rule is applicable to deliberations at the close of a case, it is even more applicable in a trial judge's deliberation on a Directed Verdict motion where all evidence of the Plaintiff, as well as inferences to be drawn therefrom, are to be viewed in the light most favorable to Plaintiff's case. For the trial judge to give such weight to an artificial presumption at the directed verdict stage as to preclude SG's positive evidence of value is clear error.

**D. If a Presumption Applies Then SACKMAN-GILLILAND Should Get the Normal Benefit of the Presumption.**

Finally, if any such presumption applies then SG should receive the full benefit of its application. The presumption CT seeks to apply, given its logical application, establishes SG's damage as the difference between the amount of the foreclosure final judgment — $3,586,727.66 — and the amount of its bid — $3,000,000.00 — for a total of $586,727.66, plus costs and interest.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail/hand delivery to THOMAS DeWOLF, ESQUIRE, 1475 Hartford Building, Orlando, Florida, this 13th day of July, 1981.

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